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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

NO. 151

HENRY BEHRENS, Petitioner,

v.

J. SCOTT SKELLY, CHARLES E. DEXTER, JR., MARC J. SANDLER, CLARENCE O. DEVORE, LIGGETT SPRING AND AXLE COMPANY and AXELTON WATER COMPANY, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO The Honorable Fred M. Vinson, The Chief Justice Of The United States, And The Associate Justices Of The Supreme Court Of The United States:

Henry Behrens, the above named petitioner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, entered on March 16, 1949 (146a), affirming the judgment order of the District Court of the United States for the Western District of Pennsylvania, entered March 5, 1948 (136a), sustaining respondents' (defendants') motion for judgment on the pleadings (95a), on the ground that petitioner (plaintiff) was barred by *res judicata* from prosecuting the action.

OPINIONS BELOW.

The opinion of the United States District Court for the Western District of Pennsylvania, dated March 1, 1948, is reported in 76 F. Supp. 75 and is found at page 123a of the Appendix. The opinion of the United States Court of Appeals for the Third Circuit, dated March 16, 1949, is reported in 173 F. 2d 715 and is found at page 138a of the Appendix.

JURISDICTION.

Jurisdiction to issue the writ is found in the provisions of Title 28, United States Code, section 1254.

The judgment of the Circuit Court of Appeals was entered on March 16, 1949 (146a), and the petition for rehearing was denied on April 4, 1949 (157a).

QUESTIONS PRESENTED.

Question 1.

Did the Circuit Court of Appeals rightly decide that there was privity, for purposes of *res judicata,* between the defendants in the instant suit and respondents in an arbitration proceeding in New York, the question of privity being dependent upon New York law?

(a) Is the doctrine of *lis pendens* (upon which the Circuit Court predicated privity) applicable to a suit against the transferor of personalty, for money damages only, the possession of the personalty itself being in no wise involved therein?

(b) Assuming an affirmative answer to (a), is a transferee who takes prior to the commence-

ment of an arbitration proceeding between his transferor and a third party, but subsequent to the special statutory proceeding whereby the third party compelled arbitration, entitled to the benefit of an award of the arbitrators in favor of his transferor, as *res judicata,* in a subsequent suit brought by the third party against the transferee?

Question 2.

Assuming an affirmative answer to Question 1, would not a Pennsylvania court, under the principles set forth in *Bigelow v. Old Dominion Copper Co.,* 1912, 225 U.S. 111, refuse to allow a transferee the benefit of a judgment in favor of his transferor where they are joint tort-feasors?

Question 3.

Recognizing that *res judicata* applies to jurisdictional questions, where, in an arbitration proceeding, (a) a defense is urged which is beyond the jurisdiction of the arbitrators, (b) eighty per cent or more of the evidence presented is directed to such defense, (c) the highest court of the state declares that the record is silent, and that it has made no attempt to speculate, as to whether the award was based on a competent ground,— may the award of the arbitrators be relied upon as *res judicata* in a subsequent suit in a Federal court without a showing that it was bottomed on a defense which is within the competence of the arbitrators?

And particularly when the parties to the subsequent suit are not identical with the parties to the arbitration and privity is lacking?

STATEMENT OF THE CASE.

This is an action for the restitution of shares of stock and other property belonging to petitioner, (plaintiff-appellant below), the possession and indicia of ownership of which were secured by respondents, (defendants-appellees below), as the fruits of a conspiracy (to defraud petitioner), engaged in by the respondents in combination with one Gertrud Feuerring and one Alfred Schwabacher and other unknown parties; for an accounting of the avails thereof and for compensatory and exemplary damages (4a-40a).

In October, 1941, Feuerring and Schwabacher, quota immigrants in the United States and residents of the State of New York, took title to all of the capital stock of Liggett Spring & Axle Company and Axelton Water Company, both Pennsylvania corporations and defendants to this action, and certain obligations of Liggett having a face value in excess of $300,000.00 (hereinafter for convenience collectively called the "acquisition"). The acquisition resulted from prolonged negotiations with the prior owner, initiated and, for the most part, carried on by petitioner, likewise a quota immigrant and resident of the State of New York. Feuerring and Schwabacher were admitted to the venture at their request, and title to the acquisition was taken in their names on behalf of and in trust for themselves and petitioner (4a-10a).

On November 12, 1941, petitioner, on the one part, entered into an agreement (31a) in the German language, with Feuerring and Schwabacher, collectively, on the other part, defining their respective rights and interests in the acquisition. The agreement provides that

petitioner had an outright interest in 10% of the acquisition, an option to purchase an additional 10% thereof, and the first refusal of the collective participation of Feuerring and Schwabacher therein in the event they desired to sell (11a-12a, 34a); it also contained an arbitration clause (37a). On December 29, 1941, Feuerring and Schwabacher repudiated the agreement by a letter to petitioner (12a-13a, 39a).

In January, 1942, (90a) petitioner demanded arbitration pursuant to the agreement, which was refused by Feuerring and Schwabacher. On March 26, 1942, (39a-40a) petitioner notified Feuerring and Schwabacher that he elected to exercise his option to purchase the additional 10% of the acquisition and to exercise all of his rights under the agreement of November 12, 1941. On June 15, 1942, petitioner notified all of the respondents and others of his right, title and interest in the acquisition (17a, 40a-42a).

On December 10, 1942, petitioner petitioned the Supreme Court of New York for an order to compel arbitration (57a). Pending the determination of this petition, on or about January 14, 1943, Feuerring and Schwabacher in furtherance of a conspiracy between them and the instant respondents (and others) to defraud petitioner of his interest and rights therein secretly caused the indicia of ownership of the shares of stock and other property comprising the acquisition to be purportedly transferred, through a straw man, to the respondents (17a-18a).

On March 1, 1943, the petition for an order directing arbitration was granted (57a). On November 5, 1943, the arbitration proceeding was commenced by a letter from petitioner's attorney to the American Arbitration

Association (60a-64a). Eighty per cent, at least, of the content of the defense and argument of counsel, before the arbitrators, was directed to fraud in the inducement, twenty per cent or less to *force majeur* (104a). On April 26, 1944, the arbitrators made the following award:

> "The claim of Henry Behrens against Gertrud Feuerring and Alfred Schwabacher for damages for breach of contract is not sustained, and is disallowed." (67a),

which was confirmed, on June 27, 1944, by the Supreme Court of New York (68a). Judgment was entered thereon June 30, 1944 (72a), which was affirmed by the Appellate Division of the Supreme Court on October 25, 1945 (88a), without opinion. The Court of Appeals of New York affirmed by opinion (90a) handed down January 17, 1947, and judgment was entered thereon (74a).

On February 7, 1947, petitioner commenced the present suit in the District Court for the Western District of Pennsylvania (1a). On March 3, 1947, respondents answered (42a, 78a) setting up the affirmative defense of *res judicata* based upon the arbitration award as affirmed.

On or about April 25, 1947, petitioner filed a notice of motion (97a) for reargument in the New York Court of Appeals, and by annexed affidavit of counsel (100a) directed the attention of that court to the instant action and the defense of *res judicata* therein raised. Petitioner's brief (102a) in support of his motion specifically requested (at 108a-109a) that court to clarify its holding, and a letter dated May 7, 1947 (109a), directed by petitioner's counsel to the Chief Judge of that court, reiterated the request, "so that the court in Pittsburgh

might know what effect is to be given to the New York judgment" (at 111a).

In denying the petition for reargument the New York Court of Appeals handed down a supplemental opinion (94a) on May 22, 1947, which declared:

> "The record herein was silent as to the basis of the arbitrators' award. This Court, by its decision, made no attempt to speculate as to that matter, but held that since the award might have rested on a ground which the arbitrators were competent to consider, other than that of fraud, there was 'no warrant for an inference of usurpation of power by them or other abuse of their office.'"

On October 24, 1947, the instant defendants moved, in the District Court, for judgment on the pleadings on the ground of *res judicata* (95a), which motion was granted on March 5, 1948 (136a) in accordance with an opinion (123a) filed March 1, 1948.

On March 16, 1949, the Court of Appeals for the Third Circuit affirmed in an opinion written by Judge Maris. A petition for rehearing was filed on March 30, 1949 (148a), which was denied on April 4, 1949 (157a).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The prevention of the improper application of *res judicata* as a defense is of the highest importance in the administration of justice. The decision of the Circuit Court of Appeals, sustaining the defense, deprived petitioner of his right to a "day in court".

On the important question of privity the decision below was not only contrary to general law but it violated the provisions of Title 28, United States Code, section 1652, in not recognizing the controlling local law in *both* New York, where the judgment relied upon was rendered, and in Pennsylvania, where the New York judgment was pleaded as an estoppel.

It is also of utmost importance that this Court declare that, although *res judicata* applies to a jurisdictional question, categorical adherence to the technical rules of the doctrine must give way to the equities in any case where such equities are against the application of the doctrine.

I.

The court below recognized that privity was essential to the defense of *res judicata* in this case and that the law of New York, the state in which the judgment relied upon as an estoppel was rendered, controls the question of privity.

However, in New York, the doctrine of *lis pendens,* upon which the court below relied for its finding of privity, is not applicable to a suit which is directed only at the recovery of damages. *Hailey v. Ano,* 1893, 136

N.Y. 569, 32 N.E. 1068. The arbitration proceeding to which the court below applied *lis pendens* was directed only at the recovery of damages.

The court below gave no authority for its application of the doctrine; nor could it have been relying upon general law which is in accord with the New York law. 54 *C. J. S.* 577 (1948); 34 *Am. Jur.* pp. 377, 379-380 (1941).

The question of the application of *lis pendens* was not raised by counsel for either side in either the District Court or the Circuit Court and was first adverted to in this cause in the opinion of the Circuit Court (141a-143a). The inapplicability of the doctrine was advanced by petitioner in his petition for a rehearing before the Circuit Court, which was denied without opinion (157a).

II.

Assuming that *lis pendens* does apply, to establish privity the succession of interest must have occurred subsequent to the commencement—at the very least—of the prior litigation.

The court below predicated its finding that the instant respondents are privies to the New York respondents on a holding that the special proceeding to compel arbitration was part and parcel of the arbitration itself (142a-143a), which is directly contrary to New York law. *Marchant v. Mead-Morrison Mfg. Co.*, 1929, 252 N. Y. 284, 169 N. E. 386 (Cardozo, J.). The rejection by the court below of the law set forth in the *Marchant* case, *supra*, on the ground that the question of privity was not there in focus (142a) disregards, and is in conflict with, what appears to be the only New York case in which the

question of the separability of preliminary proceedings and subsequent proceedings on the merits for the purpose of determining privity on a plea of *res judicata* was directly in focus, *Matter of Commercial Casualty Insurance Company,* 1939, 257 App. Div. 536, 13 N.Y.S. 2d 754, reargument denied, 1939, 14 N.Y.S. 2d 807, appeal denied, 1939, 281 N.Y. 885.

III.

Assuming the correctness of the Circuit Court's decision that a New York court would find privity between the instant respondents and the New York respondents, the court below erred in not recognizing that a Pennsylvania court would refuse to recognize any privity between them because they are joint tort-feasors. *Betcher v. McChesney,* 1917, 255 Pa. 394, 100 Atl. 124; *Hornstein v. Kramer Bros. Freight Lines,* 1943, 3 Cir., 133 F. 2d 143.

It is settled law, through this Court, that a Pennsylvania court may do so. *Bigelow v. Old Dominion Copper Co.,* 1912, 225 U.S. 111, 32 S. Ct. 641, 56 L. Ed. 1009.

The Circuit Court summarily ignored the basic Pennsylvania law that joint tort-feasors are not in privity on the authority of *Marsh v. Pier,* 1833, 4 Rawle (Pa.) 273, a case which did not involve joint tort-feasors.

IV.

Res Judicata is an affirmative defense. Although ordinarily the introduction of a judgment is *prima facie* evidence that it was rendered by a tribunal with competence to consider the subject matter, under the circumstances in this case the defendants were bound to prove

that the award, of the arbitrators upon which the judgment was predicated, was bottomed upon a defense within the competence of the arbitrators.

Conclusion.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment or decree of the Circuit Court of Appeals for the Third Circuit should be granted.

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BRIEF IN SUPPORT OF PETITION.

I.

The Doctrine of Lis Pendens, on Which the Circuit Court Based Its Conclusion of Privity, Is Not Applicable in the Instant Case Because the Arbitration Proceeding Was Directed Only at the Recovery of Damages.

The court below based its finding of privity, (and consequently sustained the defense of *res judicata*), on the doctrine of *lis pendens* (140a-143a), as appears from the following statement extracted from its opinion (142a):

> "* * * those who acquire interests pendente lite in property in litigation are in privity with the litigant from whom they acquire the property and as such are bound by, or entitled to the benefit of, the judgment subsequently entered."

Under the common law doctrine of *lis pendens*, "if no specific property is effected by the proceeding, there is nothing to which the doctrine can be applied, though the cause of action may have arisen out of a matter involving property." 34 *Am. Jur.* sec. 21, p. 379 (1941). "* * * It is not sufficient that title or right of possession of property may be incidentally effected." *Id.*, p. 380, footnote 9. This doctrine encompasses a suit for damages. *Id.* See also, 34 *Am. Jur.* p. 377 and 54 *C. J. S.* 577 (1948).

New York law is in accord, as illustrated by *Hailey v. Ano*, 1893, 136 N. Y. 569, 32 N. E. 1069, the leading case in point.

In that case a grant from X to the defendant was made while a suit in trespass (in which the issue was title) was pending by the plaintiff against X. The plaintiff recovered a judgment against X and contended that it was binding on the defendant in a subsequent suit by the plaintiff against the defendant for an alleged trespass by the defendant on the *same* property.

The New York Court of Appeals in declaring that the judgment was not *res judicata* said, (at page 577 of 136 N. Y.):

> "* * * the pendency of a trespass suit does not prevent a purchase of the land upon which the trespass was committed *pendente lite,* or give to a judgment for damages subsequently recovered therein the effect of an adjudication binding the title of such intermediate purchaser, even though he may have known that the action was for a trespass upon the land purchased."

Clearly, therefore, *lis pendens* does not apply to the transfer which occurred in this case. The arbitration proceeding was for the recovery of damages only, as recognized by the Circuit Court (144a), and not to recover property or to determine any right or interest in property *per se.*

In fact, as pointed out in *Hailey v. Ano, supra,* even actual knowledge, as opposed to constructive knowledge through *lis pendens,* would not result in privity. The reason, of course, is that the property which is transferred must be the subject of the suit.

II.

Even Assuming Lis Pendens to Be Applicable, There Is No Privity Since, Under New York Law, the Succession of Interest Occurred Before the Commencement of the Prior Applicable Litigation and Not Subsequent Thereto.

In New York, for purposes of privity, as well as for purposes of review, a proceeding to compel arbirtration and the ensuing arbitration are separate controversies.

Judge Cardozo, in *Marchant v. Mead-Morrison Manufacturing Co.*, 1929, 252 N.Y. 284, 169 N.E. 386, said:

> "An order for the specific performance of an agreement to arbitrate a controversy is one that finally determines a special proceeding (cases cited). *The proceeding thus ended is not a part of the arbitration that is thereby set in motion.* It is subject to direct review as a separable controversy." (Emphasis our own)

The court below refused to recognize the decision in the *Marchant* case as controlling on the ground that it is applicable only to the question of review; and concluded that a New York court would decide that the two distinct proceedings are inseparable for purposes of privity (142a-143a). The error in this conclusion is demonstrated by the New York case of *Matter of Commercial Casualty Insurance Company,* 1939, 257 App. Div. 536, 13 N.Y.S. 2d 754, reargument denied, 1939, 14 N.Y.S. 2d 807, appeal denied, 1939, 281 N.Y. 885, which was ignored by the Circuit Court although it appears to be the only New York decision directly in point. Simply stated, the facts in that case were as follows:

McElligott sued in the N.Y. Court of Claims for damages and in his complaint referred to an assignment of his claim to the Casualty Co. which later intervened. (First proceeding.)

After the commencement of the proceeding, McElligott made partial assignments of his claim to other assignees.

Judgment in the Court of Claims was entered for both McElligott and the Casualty Co., as their interests might appear.

The Casualty Co. then sued McElligott to determine their respective interests, and secured a judgment. (Second proceeding).

When the Casualty Co. subsequently sued the Comptroller of New York for the amount of that judgment the other assignees intervened. The Casualty Co. contended that these assignees were privy to McElligott and concluded by the judgment entered in the second proceeding on the ground that the first and second proceedings were inseparable for purposes of privity.

The New York Supreme Court, Appellate Division, held that the proceedings were distinct and separate, advancing reasons in support of its ruling which are equally applicable to the instant case, (at pages 538-539 of 257 App. Div.):

"The proceeding in the Court of Claims was merely to determine whether or not the claim had merit. The court had no authority to determine the nature or extent of petitioner's interest in that claim nor did it attempt to do so. It merely found that McElligott had made an assignment to peti-

tioner. The extent of petitioner's interest in that claim was not determined until the rendition of the judgment in its favor (in the action by the Casualty Co. against McElligott—the second proceeding). Long before that action was commenced the various other assignments of the same claim made by McElligott to the intervening defendants (subsequent assignees) had been executed and filed—" (Matter in parenthesis our own.)

In view of the above cited decision of the New York courts it is, we submit, beyond question that the court below erred in finding that the courts of New York would hold that the proceeding whereby petitioner compelled Feuerring and Schwabacher to engage in an arbitration proceeding was inseparable from the ensuing latter proceeding and concluding, from that false premise, that under the law of New York the instant respondents are in privity with Feuerring and Schwabacher (142a-143a).

III.

Assuming Privity Under New York Law, a Pennsylvania Court, Under the Doctrine of Bigelow v. Old Dominion Copper Co., 225 U.S. 111, Would Hold That Respondents, Being Joint Tortfeasors With Their Transferors Who Were Parties to the Arbitration, Could Not Avail Themselves of the Award in Favor of Their Transferors.

The court below found (143a) that the Pennsylvania law is in agreement with the New York law of privity and, consequently, that the rule of the *Bigelow* case is inapplicable herein. We submit that the court

below misunderstood the Pennsylvania law. There can be no question that in Pennsylvania joint tortfeasors are *not* in privity with each other. This rule was declared in *Betcher v McChesney,* 1917, 255 Pa. 394, 100 Atl. 124, and has been followed consistently in Pennsylvania by both the state and federal courts. *Hornstein v. Kramer Bros. Freight Lines, Inc., et al.,* 1943, 3 Cir., 133 F. 2d 143. The general rule is the same. *Bigelow v. Old Dominion Copper Co., supra,* at page 129.

The court below dismissed this line of cases upon the authority of *Marsh v. Pier,* 1833, 4 Rawle (Pa.) 273. *Marsh v. Pier,* was decided long before *Betcher v. McChesney, supra,* and in no wise involves privity as between joint tort-feasors, joint liability having been neither alleged nor considered therein. There the court simply laid down the general rule that *privies* are entitled to the benefit of a judgment in favor of their transferors and that there is privity even though the first judgment may not have been rendered until the second action was pending.

The complaint herein alleges a conspiracy between and among the instant respondents and the New York respondents, Feuerring and Schwabacher, to defraud petitioner (17a-18a). The instant respondents having moved for judgment on the pleadings (95a) concede that they are joint tort-feasors with the New York respondents. *National Metropolitan Bank v. U.S.,* 1945, 323 U.S. 454, 65 S. Ct. 354, 89 L. Ed. 383. Consequently, whatever may be the New York law as to privity, we submit that a Pennsylvania court, under the authority of the rule in the *Bigelow* case, would, contrary to the decision of the court below, refuse recognition to respondents' plea of *res judicata.*

IV.

Moreover, the Defense of Res Judicata Should Have Been Disallowed Because the Record Does Not Show That the Judgment Relied Upon Was Based on a Ground Within the Competence of the Arbitrators.

A. *Respondents Were Unable to Show That The Award Was Based on a Ground Within The Competence of The Arbitrators.*

The two major defenses relied upon by Feuerring and Schwabacher before the arbitrators were (1) fraud in the inducement of the agreement of November 12, 1941 (which contained the arbitration clause), and (2) frustration by *force majeur*. Respondents argued in their brief below that "Eighty per cent, at least, of the content of the defense and arguments of counsel (before the arbitrators) was directed to fraud in the inducement, 20 per cent or less to frustration * * *". The record supports their argument (104a).

Under New York law there can be no question that fraud in the inducement is not cognizable by arbitrators. *Matter of Lipman v. Haeuser Shellac Co.*, 1942, 289 N.Y. 76, 43 N.E. 2d 817; *Matter of Aqua v. H. Warshaw & Sons, Inc.*, 1943, 179 N.Y. Misc. 949, affirmed without opinion 266 App. Div. 718, appeal denied, 290 N.Y. 929. Semble, the defense of frustration is likewise beyond the jurisdiction of arbitrators. *Matter of Kramer v. Uchitelle, Inc.*, 1942, 288 N. Y. 467, 43 N.E. 2d 493. If the award, therefore, was based upon the ground of fraud in the inducement, it was void, since a judgment is void if it is not rendered by a court with competency of the subject matter. *Robertson v. Gordon*, 1912, 226 U.S.

311, 33 Sup. Ct. 105, 57 L. Ed. 236. See also, *Restatement, Judgments,* section 7 (1942).

Clearly, if only an invalid defense had been presented the award would have been void. If, in fact, a defense beyond the arbitrators' competence bottomed the award, respondents here should not be in a better position simply because their transferors also set forth a valid defense.

Under any theory of presumptions or burden of proof the court below erred in sustaining respondents' plea of *res judicata.* Where a judgment appears to be that of a court of general jurisdiction, jurisdiction over the subject matter is presumed unless the contrary is disclosed either by the record or by extrinsic evidence. *Milliken v. Meyer,* 1940, 311 U.S. 457, 61 S. Ct. 339, 85 L. Ed. 278, rehearing denied, 1941, 312 U.S. 712, 61 S. Ct. 548, 85 L. Ed. 1143; *Settlemier v. Sullivan,* 1878, 97 U.S. 444, 24 L. Ed. 1110.

Since arbitrators are not a court of general jurisdiction—and it is basically the arbitrators' award which is being pleaded as *res judicata* — the presumption does not operate in favor of their award. Even if we assume that the award is a judgment of a court of general jurisdiction because of the New York procedure whereby awards are confirmed by the courts, we submit that the record herein sufficiently discloses a lack of jurisdiction to place on respondents the burden of proving proper jurisdiction. The record discloses not only the possibility but the very great probability that the award was predicated on a non-competent ground, eighty per cent of the content of defense having been directed to fraud

in the inducement, twenty per cent or less to frustration (104a).

But even though the District Court and Circuit Court were of the opinion that the record of the New York judgment disclosed jurisdiction over the subject matter, petitioner should not have been foreclosed on the issue. He was entitled to an opportunity to prove the contrary.

Respondents' contention, which was adopted by the court below (145a), that the affirmance of the arbitrators' award by the New York Court of Appeals is *res judicata* of the jurisdictional issue ignores the realities of the instant case, and, unless this Court declares to the contrary, will stand as binding precedent for the proposition that the doctrine of *res judicata* must be applied indiscriminately whenever the technicalities will permit, without regard to the circumstances or equities in any given case.

B. *The Principle That Res Judicata Also Applies to Questions of Jurisdiction Is Not Applicable To The Instant Case.*

We are not unmindful of the law enunciated in the line of cases exemplified by *Forsythe v. Hammond,* 1896, 166 U.S. 506, 17 S. Ct. 665, 41 L. Ed. 1095, *American Surety Company v. Baldwin et al.,* 1932, 287 U.S. 156, 53 S. Ct. 98, 77 L. Ed. 231, and *Stoll v. Gottlieb,* 1938, 305 U.S. 165, 59 S. Ct. 134, 83 L. Ed. 104.

The instant case is distinguishable. Here the New York Court of Appeals was, contrary to the usual prac-

tice, confronted with the specific question of the extent of faith and credit it intended should be accorded to its judgment by the courts of another forum for purposes of *res judicata.*

On April 25, 1947, petitioner applied to the New York Court of Appeals for reargument (97a) supporting his application by an affidavit of counsel (100a) which specifically referred to this litigation and to respondent's plea of *res judicata* herein. Petitioner's attorney, prior to motion day, directed a letter (109a) to the Chief Judge of the New York court pointing out that the award as affirmed might be held *res judicata* in this action. Petitioner's brief in support of his application (102a-109a) was to the same effect.

The application, supporting brief, and counsel's letter were all directed at securing from that court a declaration as to the effect of the court's affirmance (90a) of the award: whether, for purposes of *res judicata,* it was intended as an affirmance of the jurisdiction of the arbitrators over subject matter not within their competence.

If the New York court of Appeals intended to affirm the award for all purposes there was no need for it to hand down the supplemental opinion (94a). Had such been the court's intention it would have been sufficient to have denied reargument, without more. We strongly urge that the supplemental opinion, taken with the circumstances which prompted it, indicates that the New York Court of Appeals deliberately intended thereby to relegate to any court in which the award might be pleaded as *res judicata* the decision as to what effect should be given the award.

The equities of the case favor such a conclusion. The rationale of the policy of *res judicata* is that one suit which gives a fair opportunity to determine the cause of action should be enough. But can it be said that a litigant has been given a fair opportunity to have his cause of action determined when the determination has been made on issues which are not cognizable by the tribunal considering them?

The equities in favor of petitioner are even stronger here where the respondents are not in privity with the defendants in the arbitration award. Here, co-conspirators are asking that petitioner be bound by a judgment which petitioner could not have invoked against respondents, and in addition, by a judgment the validity of which is in such doubt as to cause the New York Court of Appeals to bottom its affirmance (90a) upon the ground that the "record was silent as to the basis of the arbitrators' award" and the bare possibility that it "might have rested on a ground which the arbitrators were competent to consider" (93a, 94a).

C. *Compelling Respondents to Show a Competent Basis Does Not Deprive Them of the Benefits of the Award For Purposes Of Res Judicata Beyond The Question of Jurisdiction.*

We recognize the distinction between *res judicata* as a bar to an action and estoppel by verdict of a particular issue, and we concede that even if the arbitration award was based on an issue which would not decide the instant case, *if that issue were within the competence of the arbitrators,* all issues which might have been litigated and which would be decisive in the instant case would be foreclosed.

In short, we do not contend that respondents must show the basis of the award in order to show that it is decisive of the issues in this case. All petitioner asks is that respondents carry their burden of proof on the matter of competency and show that the issue bottoming the award was within the jurisdiction of the arbitrators.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1949

NO. 151.

HENRY BEHRENS, Petitioner,

v.

J. SCOTT SKELLY, CHARLES E. DEXTER, JR., MARC J. SANDLER, CLARENCE O. DEVORE, LIGGETT SPRING AND AXLE COMPANY and AXELTON WATER COMPANY, Respondents.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

In arguing in their brief (pp. 3-4) that commencement of a suit rather than rendition of a judgment is the time at which to determine privity, respondents set up a straw man. We did not advance this question in our principal brief but, on the contrary, we proceeded on the assumption that commencement of a suit is the proper time.

I.

There Is No Privity Under New York Law.

A. *Under The Doctrine Of Hailey v. Ano Neither Actual Notice Nor Constructive Notice Can Establish Privity In This Case.*

Respondents admit that *lis pendens* does not apply to this case and contend (brief, p. 3) "that the court by such reference was buttressing by analogy" its finding of privity. They now argue that regardless of *lis pendens,* the finding of privity by the lower court is supported by actual notice. (brief, p. 5.)

The language of the court below certainly indicates that it based its finding of privity on the doctrine of *lis pendens,* which, in our principal brief (pp. 12-13) we demonstrate to be inapplicable. However, anticipating that respondents would take recourse to the contention that privity might be predicated upon actual notice, we went further and quoted (brief, p. 13) the language of New York court in *Hailey v. Ano,* 1893, 136 N. Y. 569, 32 N. E. 1068, to the effect *that even actual knowledge of a suit for recovery of damages does not support a finding of privity.* Respondents' argument ignores the fact that "actual notice" is inapplicable for the same reason that *lis pendens* is inapplicable, as pointed out by the court in *Hailey v. Ano, supra.*

After thus ignoring New York law on privity, respondents blithely assert (brief, p. 5) that they would be bound had the award in question gone against Feuerring and Schwabacher. *Respondents conceded, in fact argued, precisely to the contrary before the District Court.* Nor

do we know of any case—and respondents cite none—in which a successful plaintiff in a suit for recovery of damages was permitted to fasten the judgment which he received on a third person, not a party to the first suit, merely because such third person was a transferee of personalty from the prior defendant subsequent to the institution of the first suit.

B. *Even Assuming the Applicability of Privity, The Succession In Interest Occurred Prior To The Commencement Of The Relevant Prior Litigation So That There Could Be No Privity.*

Respondents argue (brief, p. 6) that the Circuit Court considered *Matter of Commercial Casualty Insurance Company,* 1939, 257 App. Div. 536, 13 N.Y.S. 2d 754, upon which we rely on the question of separability, and that the facts therein were not analagous to the facts in the instant case.

Reference to the Circuit Court's opinion (R. 141, 142) discloses that the citation of the *Commercial Casualty* case, in each instance, was one of a series cited only on the point that the date of the commencement of a suit and not the date of the rendition of judgment therein is the critical date in determining privity, a point not in issue here.

To clearly demonstrate that on the issue of separability the facts therein were analagous to the facts herein, and that the decision there should be controlling here, we take the liberty, at the risk of being redundant, of both requoting and paraphrasing the portion of the New York Court's opinion quoted in our principal brief (pp. 15-16):

FROM COMMERCIAL CASUALTY CASE	AS PARAPHRASED
"The proceeding in the Court of Claims was merely to determine whether or not the claim had merit. The court had no authority to determine the nature or extent of petitioner's interest in that claim nor did it attempt to do so. It merely found that McElligott had made an assignment to petitioner. The extent of petitioner's interest in that claim was not determined until the rendition of the judgment in its favor (in the action by the Casualty Co. against McElligott—the second proceeding). Long before that action was commenced the various other assignments of the same claim made by McElligott to the intervening defendants (subsequent assignees) had been executed and filed—" (Matter in parenthesis our own.)	The proceeding in the Supreme Court of New York was merely to determine whether or not the claim (that petitioner had a right to arbitration) had merit. The court had no authority to determine the nature or extent of petitioner's interest nor did it attempt to do so. It merely found that Feuerring and Schwabacher had made a valid agreement to arbitrate. The extent of petitioner's interest under the contract containing the arbitration clause was not determined until the rendition of the judgment against him. Long before that action (the arbitration itself) was commenced the transfer was made to the defendants in this suit.

To argue, as respondents do, (brief, pp. 6-7) that two separate actions were involved in the *Commercial Casualty* case and that only one action is involved here

is a striking example of litigants attempting to lift themselves by their own bootstraps. It indicates, also, that respondents fail to comprehend the issue involved, —whether notice, actual or constructive, of a pending proceeding which does not adjudicate any claim against a transferor binds a subsequent transferee.

Here the *only* issue adjudicated or involved in the proceeding to compel arbitration was whether or not the petitioner had a right, under the agreement of November 12, 1941, (R. 31a), to compel the respondents to arbitrate all "controversies, disputes and matters of difference which may have arisen among the parties" (R. 57a-60a). It was not an adjudication of any specific claim (R. 57a-60a). In the *Commercial Casualty* case, on the other hand, the proceeding before the Court of Claims adjudicated that the state was, without question, indebted to McElligott or the Insurance Company or both but left for the second proceeding the precise determination of the amounts owing to each. Nevertheless, on the ground that the first action did not adjudicate the extent of the petitioner's interest, the court held that the actions were separable. *A fortiori,* if the proceedings in the *Commercial Casualty* case were separable the proceedings here in question are likewise separable.

Respondents contend, on the strength of the opinion below (R. 143), that a proceeding to compel arbitration is analagous to the issuance and service of process in an ordinary law suit, and thus marks the commencement of an arbitration proceeding. This argument misapprehends the nature of an arbitration proceeding and overlooks the fact that a proceeding to compel arbitration is not a necessary or invariable element in the determina-

tion of a dispute by arbitration in New York. On the contrary, it is a special proceeding that is very seldom resorted to, and then only when it is necessary for a party aggrieved to force his adversary to proceed to arbitration, by a mandate of a court, the breach of which would be punishable as a contempt of court. When the order directing the parties to proceed to arbitration (or refusing to make such direction) is made, that special proceeding is terminated. *Marchant v. Mead-Morrison Manufacturing Co.*, 1929, 252 N. Y. 284, 169 N. E. 386.

II.

Respondents by Virtue of Being Accessories as Well as Principals to a Fraud Are Not Thereby Removed From the Application of the Joint Tort Feasor Rule.

Respondents argue (brief p. 7) that the allegation in the Complaint (R. 17a-18a) of a conspiracy between and among the New York respondents and the respondents here to defraud petitioner is immaterial. Their argument is bottomed upon the fact that the *res* here in question was *purportedly* (R. 17a) transferred to the instant respondents. The purported transfer was part and parcel of the conspiracy (R. 17a-18a). If respondents' argument is to be followed, the astounding legal anomaly would result that although joint tort feasors are both jointly and severally liable, should one tort feasor become the receiver of the fruits of the fraud, as well as having been a principal to the fraud, he is, by virtue of having thus become an accessory as well as principal, permitted to become the beneficiary of a judgment rendered in favor of his partner in fraud.

Respondents also question (brief p. 8) whether, in view of the fact that this action sounds in equity, a tort is here alleged. It is, we suggest, novel law if an action in equity may not be predicated upon a tort.

III.

Respondents Do Not Come Within the Exception to the Mutuality Rule.

Respondents quote (brief p. 8) the *Restatement of Judgments,* sec. 99, as justifying the application of the exception to the mutuality rule to this case. The rule of the Restatement is but a codification of the law laid down in *Bigelow v. Old Dominion Copper and Mining Company,* 1912, 225 U. S. 111, 32 S. Ct. 641, 56 L. Ed. 1009. Clearly respondents do not fall within the scope of the exception as there enunciated. Even if it be conceded that the rule of the Restatement enlarges the scope of the rule of the *Bigelow* case, the respondents do not fall within the exception as enlarged. The Restatement rule allows the application of the exception only if the second action is "based *solely* upon the existence of a tort or breach of contract" by the defendant in the first action. (Emphasis supplied). Here, petitioner is not suing respondents on a cause of action based *solely* upon the commission of a tort by Feuerring and Schwabacher but upon a tort committed *jointly* and simultaneously by Feuerring and Schwabacher and the present respondents. The rule of the Restatement might be applicable only if the respondents were bona fide purchasers.

Conclusion.

We respectfully submit that the Circuit Court of Appeals was in error in its conception of the applicable law of both New York and Pennsylvania in every respect important to the proper determination of this case. Under the New York law the nature of the proceeding to compel arbitration entirely foreclosed the application of the rules of privity to this case,—yet the opinion below is firmly bottomed thereon. If it be conceded that privity is applicable, the relevant New York decisions preclude its application here because the proceedings to compel arbitration and the arbitration proceedings are separable, and the purported succession in interest occurred too early for purposes of privity.

Moreover, even if the respondents here are privy to the New York respondents they would, under the Pennsylvania law, as joint tort feasors, be denied the benefit of the arbitration award in favor of their co-conspirators under the rule of *Bigelow v. Old Dominion Copper and Mining Company, supra.*

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BRIEF OF RESPONDENTS IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI.

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BRIEF OF RESPONDENTS IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI.

Opinions Below.

The opinion of the Court of Appeals for the Third Circuit handed down on March 16, 1949, is reported in 173 F. 2d 715. It affirmed the judgment entered pursuant to the opinion of the District Court for the Western District of Pennsylvania dated March 1, 1948, and reported in 76 F. Supp. 75.

Jurisdiction.

Jurisdiction of this Court to entertain a petition for writ of certiorari is provided by 28 U.S.C. § 1254.

ARGUMENT.

Summary.

1. The Court of Appeals correctly held that the respondents were in privity with the prevailing party in the prior litigation and thus were entitled to rely upon the prior judgment as *res judicata* of the issues in this action. The decision below was not based on the doctrine of *lis pendens;* the respondents succeeded to the property involved in the prior litigation after the commencement thereof; and the allegation of conspiracy between the respondents and their vendors does not operate to deny to the respondents the defensive protection of the prior judgment.

2. If it should be held that the respondents were not in privity with the prevailing party in the prior litigation, they are nevertheless entitled to the defensive protection of the judgment entered therein under an exception to the rule of privity.

3. The prior judgment was held valid in a direct attack upon it by the petitioner and such adjudication is binding upon the petitioner, precluding collateral attack upon the validity of that judgment.

4. The court below correctly applied local law in its disposition of this action and consequently no reason for review upon certiorari is presented.

I. The Court of Appeals Correctly Decided the Issue of Privity.

A. *The Decision Below Was Not Based on the Doctrine of Lis Pendens.*

This petition for a writ of certiorari is an excellent example of the "tyranny of labels."* Seizing upon the Court of Appeals' use of the words "pendente lite" (R. 142), the petitioner immediately deduces that "The court below based its finding of privity * * * on the doctrine of *lis pendens* * * *" (brief p. 12), and argues (brief pp. 12-13), wholly apart from the realities of the case, that the doctrine of *lis pendens* is not applicable.

The fallacy in the petitioner's argument stems from his misconstruction of the Court of Appeals' opinion. A careful reading of the portions of that opinion in which the court spoke of the acquisition of interests in property *pendente lite* (R. 141-42) indicates not that the court was applying the doctrine of *lis pendens* but merely that the court by such reference was buttressing by analogy its conclusion that under the law of New York privity is established by a succession in interest to the same property rights occurring after the commencement of the prior action.

The court below recognized that some New York cases contain language to the effect that privity is established only where the succession in interest occurs after the date of the rendition of the prior judgment (R. 141). The court pointed out, however, that in those cases, the

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* Mr. Justice Cardozo in *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934).

question of the critical date, whether it be the institution of the prior action or the rendition of the judgment, was "not in focus" (R. 141), and found that the New York law was in accord with the well-nigh universal rule that the critical date is that of the institution of the action. *A.L.I. Restatement of the Law, Judgments,* § 89; 1 Freeman, *Judgments* (5th ed.) § 440, p. 967.

Whether or not *Hailey v. Ano,* 136 N.Y. 569, 32 N.E. 1068 (1893, opinion by Chief Judge Andrews) holds that the doctrine of *lis pendens* does not apply to an action for the recovery of damages, as the petitioner argues, is, therefore, immaterial to this controversy since the doctrine was not applied by the Court of Appeals.

It can scarcely be argued that *Hailey v. Ano* establishes a rule that there is no privity unless the succession in interest occurs after the rendition of the judgment. The petitioner does not so contend and the case does not so hold. Quite obviously the court there was not dealing with the question of the critical date of the succession in interest for determining privity in the application of the doctrine of *res judicata,* for the defendant there acquired her interest not only after commencement of the prior action, but also after the rendition of the prior judgment and was held not to be a privy, apparently because she was not an immediate successor in interest to a party to the prior action.

If, on the other hand, *Hailey v. Ano* should be construed as precluding the establishment of privity if the succession in interest occurs prior to the rendition of the former judgment, it must be considered to have been overruled *sub silentio* by *Williams v. Barkley,* 165 N.Y. 48, 58 N.E. 765 (1900, opinion by Judge Vann), where

a successor to a partial interest in property prior to the former adjudication was held bound by the prior decision adverse to his predecessor. *Application of Commercial Casualty Insurance Company,* 257 App. Div. 536, 13 N.Y.S. 2d 754 (3rd Dept., 1939, opinion by Heffernan, J.), upon which the petitioner relies in arguing point II in his brief (pp. 14-16) clearly evidences the current New York law that privity is established where the succession in interest occurs after the commencement of the prior action without regard to when the prior judgment was entered.

There can be no question but that upon the record before this Court the respondents, at the time they purchased their interests from the successful parties to the former adjudication, had actual notice of the alleged rights of the petitioner. The petitioner expressly alleges and relies upon the notice which the respondents had (complaint, paragraphs 26, 27, 28, 29, and 30, R. 13-17). Under these circumstances it is eminently proper that the respondents should have been bound by the outcome of the prior proceedings had the result in those proceedings been adverse to the respondents' vendors. For like reason, the award having been favorable, it and the judgment entered thereon should accrue to the benefit of the respondents.

B. *The Succession in Interest Occurred After the Commencement of the Prior Litigation.*

The petitioner takes issue with the conclusion of the Court of Appeals (R. 142-43) that his institution in the Supreme Court of New York on December 10, 1942, of proceedings to compel arbitration was the commencement of the prior litigation which culminated in the

award of the arbitrators and the judgment of the New York courts entered upon that award. He tacitly agrees with the court below (R. 142) that *Marchant v. Mead-Morrison Manufacturing Company,* 252 N.Y. 284, 169 N.E. 386 (1929, opinion by Chief Judge Cardozo), did not pass upon the question here in issue but dealt with the question whether a proceeding to compel arbitration is appealable so that a failure to appeal from it would foreclose collateral attack. But he argues (brief pp. 14-16) that *Application of Commercial Casualty Insurance Company, supra,* 257 App. Div. 536, 13 N.Y.S. 2d 754, is controlling in his favor and was ignored by the Court of Appeals.

That the case was not ignored but was considered by the Court of Appeals is shown by the reference to it at two places in the opinion (R. 141, 142). It is not remarkable that the court below did not see fit explicitly to demonstrate that the case was not in point. Patently, the question of the separability, for purposes of *res judicata,* of proceedings to compel arbitration and the arbitration itself was not involved there, nor does the case furnish a proper analogy. The two court actions with which that case was concerned were two ordinary, separate actions with separate and distinct interests in issue in each of them. Both of them were undoubtedly instituted by accepted methods of issuance and service of process. An arbitration proceeding, on the other hand, is not instituted in that manner in New York, but is set in motion by proceedings to compel arbitration whereby a court orders the parties to arbitrate (see R. 57-60). The proceedings to compel arbitration do not adjudicate any interest of either party but merely set in motion the procedure for determining those interests, and thus constitute the commencement of the arbitra-

tion proceeding. The analogy to the issuance and service of process for an appearance in an ordinary law suit, drawn by the court below (R. 143), is apt.

C. *Privity Is Not Defeated by the Allegation of Conspiracy.*

Proceeding from his allegation of a conspiracy, the petitioner argues (brief pp. 16-17) that under Pennsylvania law conspirators, being joint tort-feasors, are not in privity with each other and that, therefore, a Pennsylvania court, under the doctrine announced in *Bigelow v. Old Dominion Copper Mining and Smelting Co.*, 225 U.S. 111 (1912, opinion by Mr. Justice Lurton), would not recognize the privity existing between the respondents and the successful parties in the arbitration proceedings. The argument indicates a misunderstanding of the rationale of the Bigelow and other cases with respect to lack of privity among joint tort-feasors. The joint commission of a tort does not destroy privity otherwise established between joint tort-feasors by a mutual or successive relationship to the same right of property, but merely does not of itself establish privity (see 225 U.S. at pp. 129, 132; 1 Freeman, *Judgments*, (5th ed.) § 438, p. 963). In other words, joint tort-feasors are not outlaws from whom are taken rights which accrue to them from relationships which are otherwise established.

Moreover, in the case at bar the prior litigation was admittedly one for damages for breach of contract (petitioner's brief, p. 13) as the court below held (R. 144). Consequently, the judgment entered on the award of the arbitrators was not one entered in favor of an alleged

joint tort-feasor upon the cause of action arising from the commission of the alleged tort.

Finally, the complaint herein (R. 4-20), properly construed, does not allege a cause of action based upon the existence of a tort. The action is in essence one sounding in equity whereby the petitioner seeks to establish his title to the property and seeks the assistance of the court in vesting legal title in him.

II. If the Issue of Privity Was Not Correctly Decided, the Court of Appeals' Decision Is Nevertheless Correct Under an Exception to the Rule of Privity.

While we are convinced that the Court of Appeals correctly decided the issue of privity, nevertheless, in order to sustain the decision of that court, it is not essential that such privity be held to exist since the respondents are within an exception to the rule of privity, a proposition advanced below by the respondents. This exception, which is incorporated in *A. L. I. Restatement of the Law, Judgments,* § 99, is that a judgment on the merits against the plaintiff in an action against a person for breach of contract bars a subsequent action by that plaintiff against another person based upon the existence of the same breach of contract. The exception permits the defensive use of a judgment against a party to it by one who is neither a party to the judgment nor technically in privity with a party.

This exception is fully recognized by the New York courts. *Eissing Chemical Co. v. People's National Bank of Brooklyn,* 205 App. Div. 89, 199 N.Y. Supp. 342 (2nd Dept., 1923, opinion by Jaycox, J.), affirmed, 237 N.Y. 532, 143 N.E. 731 (1923, no opinion), was an action against the bank for permitting Eissing, the president

of the plaintiff, to deposit checks drawn to the order of the plaintiff in his own account as trustee and to withdraw such checks for his own use. In a prior action by the plaintiff against Eissing and others, it was determined that plaintiff had no cause of action against Eissing because of his withdrawal of amounts in the account and conversion of them to his own use. This prior judgment was held to be available as a defense to the bank although it was neither a party to the prior action nor in privity with a party. The prior judgment determined that Eissing had not converted funds belonging to the plaintiff and this was held to bar the action which was based upon permitting such an alleged conversion.

American Button Co. v. Warsaw Button Co., 31 N.Y.S. 2d 395 (Sup. Ct. Monroe Co., 1941, opinion by Wheeler, J.), affirmed, 265 App. Div. 905, 38 N.Y.S. 2d 570 (4th Dept., 1942, no opinion), was an action for damages for wrongfully inducing an employee of the plaintiff to breach his contract of employment with the plaintiff. The court held that the action was completely barred by a judgment against the plaintiff in an earlier action by it against the employee for breach of the contract of employment even though the defendant was not a party to the prior action or in privity with a party to it.

The dissenting opinion of Judge Clark in *Riordan v. Ferguson,* 147 F. 2d 983 (C.C.A. 2, 1945), contains a comprehensive review and analysis of the New York cases dealing with exceptions to the rule of privity (pp. 990-93). The conclusion which Judge Clark reached with respect to the New York law, which conclusion was not contrary to the majority opinion in that case since under the majority opinion the application of the doc-

trine of *res judicata* was not reached, is stated as follows at page 993 of 147 F. 2d:

> "It seems to me reasonably clear that New York is committed to applying the exception along broad lines to accord the defensive protection of estoppel of a former judgment to those whose liability must be founded, if at all, upon just the same issue as has been previously litigated."

This exception is an enlargement of the exceptions to the rule of privity enumerated in *Portland Gold Mining Co. v. Stratton's Independence, Ltd.,* 158 Fed. 63 (C.C.A. 8, 1907, opinion by Judge VanDevanter), the principle of which case is adopted in *A. L. I. Restatement of the Law, Judgments,* § 96 (see especially comment b thereto). Other New York cases recognizing applicable exceptions to the rule of privity are *Liberty Mutual Insurance Co. v. Colon & Co., Inc.,* 260 N.Y. 305, 182 N.E. 506 (1932, opinion by Judge Lehman) and *Good Health Dairy Products Corp. v. Emery,* 275 N.Y. 14, 9 N.E. 2d 758 (1937, opinion by Judge Finch).

III. The Validity of the Prior Judgment Was Sustained Upon Direct Attack.

The argument of the petitioner (brief pp. 18-23) is that the award of the arbitrators which formed the basis for the prior judgment might have been void because it might have gone upon a ground alleged to be beyond the jurisdiction of the arbitrators; and that because the respondents did not prove that the award was based upon a ground within the competence of the arbitrators, the judgment entered on it is not available to sustain the plea of *res judicata.*

Although the petitioner recognizes (brief p. 19) that normally the burden of proving the invalidity of the prior judgment is upon the party who denies its validity, the petitioner argues, without benefit of authority, that this burden should not be upon him in the instant case because the judgment was based upon an award of arbitrators, who do not constitute a court of general jurisdiction. This argument is directly in the teeth of section 1466 of the New York Civil Practice Act, which provides that a judgment entered in conformity with an order confirming an award "* * * has the same force and effect, in all respects as, and is subject to all the provisions of law relating to, a judgment in an action; * * *", as the court below held (R. 145).

The petitioner next suggests (brief p. 20) that if the burden was upon him to prove the invalidity of the award, he is entitled to an opportunity so to do. The petitioner has had that opportunity and has failed. He contested the validity of the award by direct proceedings in the New York courts, but the New York Court of Appeals held that the award was valid, *Behrens v. Feuerring,* 296 N.Y. 172, 71 N.E. 2d 454, reargument denied, 297 N.Y. 472, 74 N.E. 2d 180 (1947, opinions by Chief Judge Loughran). The petitioner is bound by this adjudication and cannot now collaterally attack the judgment, the validity of which he failed to sustain in a direct attack, *Sherrer v. Sherrer,* 334 U.S. 343 (1948, opinion by Mr Chief Justice Vinson), and cases cited at p. 350 thereof.

The petitioner takes issue with this position by arguing (brief, pp. 20-22) that by its opinion denying petitioner's motion for reargument the New York Court of

Appeals refused to adjudicate the validity of the award and specifically left the question open for decision by another court when collateral attack might be made on the judgment.

The affidavit of petitioner's counsel in the New York proceedings (R. 100-101), as well as his letter to Chief Judge Loughran (R. 109-11) furnished in support of his motion for reargument, both stressed the proposition that the respondents in the instant case were urging that the New York Court of Appeals held that the award in New York was based upon the issue of impossibility of performance, that the opinion of the Court of Appeals might be so construed, and that counsel for the petitioner felt that the court did not mean the opinion so to be construed. The respondents here were not urging that interpretation of the opinion (R. 51-53). The particular issue upon which the award was made was and is wholly immaterial since, as the petitioner admits (brief pp. 22-23), the causes of action being the same, the prior judgment is a complete bar to this action and does not operate merely as a collateral estoppel. The opinion denying the motion for reargument merely made doubly certain that the New York Court of Appeals in its first opinion did not hold that the award was necessarily based upon the issue of impossibility of performance. The denial of the motion for reargument did not, however, affect, otherwise than to strengthen, the prior holding of the New York Court of Appeals that the award was valid.

It is asserted at page 18 of petitioner's brief that "Respondents argued in their brief below that 'Eighty per cent, at least, of the content of the defense and arguments of counsel (before the arbitrators) was directed

to fraud in the inducement, 20 per cent or less to frustration * * *'. The record supports their argument (104a)." A reference to the record citation shows that the authority for this statement is the petitioner himself, not the respondents.

The New York Court of Appeals held that the issue of impossibility of performance was clearly cognizable by the arbitrators, but did not hold or suggest that the issue of fraud in the inducement of the contract was beyond the jurisdiction of the arbitrators. It expressly declined to pass upon that question, 296 N.Y. 172 at 178, 71 N.E. 2d 454 at 456. As appears from the cases referred to by the New York Court of Appeals, we believe that that question is open in the New York Court of Appeals, and the New York Supreme Court has held, in the decision from which the appeal was taken to the New York Court of Appeals, that the issue was cognizable by the arbitrators under the broad provision for arbitration contained in the agreement between the petitioner and the New York respondents, *Matter of Behrens (Feuerring)*, 182 Misc. 979, 49 N.Y.S. 2d 753 (Sup. Ct. N.Y. Co., 1944, opinion by Steuer, J.).

IV. The Petitioner Has Failed to Establish a Proper Basis to Justify a Review by This Court.

Of the generally accepted reasons which will be considered by this Court in determining whether or not to exercise its discretion in favor of reviewing a case on a writ of certiorari, the petitioner urges that the Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions (brief p. 8). Petitioner contends that the deci-

sion of the court below violated the provisions of 28 U.S.C. § 1652.

We submit that the requirement of 28 U.S.C. § 1652 is satisfied when a federal court, having jurisdiction by virtue of a diversity of citizenship, decides the case in accordance with the law of the state in which the court is sitting, *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938, opinion by Mr. Justice Brandeis). That the court below has done so in this case is conclusively shown by the fact that it expressly followed the decision of the Pennsylvania Supreme Court in a case practically on all fours with the case at bar. The Court of Appeals held that the principle of *Marsh v. Pier,* 4 Rawle (Pa.) 273 (1833, opinion by Mr. Justice Kennedy) was controlling. Pier, the owner of certain logwood, shipped it on his own vessel, bound for New York. The vessel, having become unseaworthy, put in at New Orleans, and the master of the vessel put the logwood in the hands of W. Nott & Co. to be sold by them. They sold it to S. P. Morgan & Co., who shipped it to Philadelphia to C. Price & Morgan, who sold it to Marsh. Pier sued W. Nott & Co. in New York for damages for breach of contract by reason of selling the wood and for breach of contract to account for the proceeds. Judgment was entered against Pier. Prior to the entry of the New York judgment, Pier brought replevin for the wood against Marsh in Pennsylvania. Marsh's defense was that Pier had no right of property in the logwood, and to sustain this plea, he offered the record of the New York judgment against Pier. The Pennsylvania Supreme Court, reversing the lower court, held that the New York judgment was *res judicata* of the issues in the Pennsylvania case and barred Pier's action.

In the instant case, the petitioner also sued the respondents' vendors in New York for damages for breach of contract arising in the instant case from action taken by those vendors with respect to the shares of stock and other property involved in this case. Prior to the rendition of judgment in that case, the respondents here acquired their interests in that property. In this Pennsylvania action, brought to recover that property, the prior judgment against the petitioner in New York is *res judicata* of the issues here and bars the present action, just as the prior New York judgment barred recovery in the Pennsylvania action in the *Marsh* case.

CONCLUSION.

We submit that the decision of the Court of Appeals was fully justified upon principle and authority, that the opinion of the court below offers a reasoned basis for its decision, and that the court fully and completely satisfied its duty of deciding the case in accordance with the principles of applicable local law. The petition for writ of certiorari should therefore be denied.

Respectfully submitted,

LEON E. HICKMAN,
Counsel for Respondents.

July 20, 1949.